

Chief Judge Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 HENRY CARL ROSENAU,)
)
 Defendant.)

NO. CR06-157MJP

GOVERNMENT'S RESPONSE
TO DEFENDANT'S MOTION FOR
REVOCATION OF DETENTION
ORDER

Hearing: Wednesday, November 9,
2011, at 9:00 A.M.

The United States of America, by and through Jenny A. Durkan, United States Attorney for the Western District of Washington, and Susan M. Roe and Marc A. Perez, Assistant United States Attorneys for said District, files this response to the defendant's motion for revocation of detention order.

I. INTRODUCTION

On September 17, 2011, a grand jury returned a Superseding Indictment charging Defendant Henry C. Rosenau with one count of conspiracy to import 1000 kilograms or more of marijuana, in violation of 21 U.S.C. §§ 960(a)(1), 960(b)(1)(G) and 963, one count of conspiracy to distribute 1000 kilograms or more of marijuana, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 846, and one count of possession with intent to distribute 100 kilograms or more of marijuana, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B) and 18 U.S.C. § 2. Each of these offenses are punishable by a maximum term in excess of 10 years

1 of imprisonment, and therefore raises a presumption of detention pursuant to 18 U.S.C. §
2 3142(e).¹

3 After several years of legal wrangling, Defendant Rosenau was extradited from
4 Canada to the United States and arrested on April 28, 2011. Despite the presumption of
5 detention, he was released to his home in Quesnel, Canada, subject to certain conditions.² In
6 July, he violated those conditions by possessing marijuana; however, he was released to
7 Canada after his conditions of release were modified to include drug and alcohol testing.
8 Last month, the defendant appeared before the court on a new, more serious violation of his
9 conditions of release. He violated his appearance bond by having indirect contact with at
10 least one government witness in this case. Such contact is prohibited, of course, because it
11 quickly leads to obstruction of justice, as it has in this case.

12 The Magistrate Judge concluded that the defendant's indirect contact with a witness
13 violated his conditions of release and revoked the defendant's appearance bond. Given the
14 nature of the underlying offense and bond violation, the court ordered the defendant detained
15 pending trial. Defendant now seeks review of that revocation and detention order. Based on
16 the nature of the offense, the presumption against release, the defendant's role in the
17 underlying offenses, his ties to larger criminal enterprises and other jurisdictions, and the
18 nature of the violation of his conditions of release, Defendant Rosenau should be detained
19 pending trial.

25 ¹ The statutory penalties for a violation of 21 U.S.C. §§ 960(b)(1)(G) and 841(b)(1)(A) include
26 imprisonment for a mandatory minimum term of 10 years and maximum term of life imprisonment.

27 ² Quesnel is located in the Cariboo region of the British Columbia Interior. According to B.C.
28 Tourism information, Quesnel is 400 plus miles north of Vancouver, B.C., and has a population of 10,
500.

II. BACKGROUND OF THE CASE

A. Statement of Facts.

In 2004 and 2005, a group of helicopter pilots in Canada facilitated the cross-border marijuana traffic into the United States. The pilots, hired by larger criminal organizations or marijuana brokers who owned or sold the marijuana, flew the helicopters across the international border in a manner designed to hide their activities. The pilots often flew at low altitudes, did not file flight plans, camouflaged the tail identification markers, landed at make-shift and undesignated sites, and failed to report their entries or exits to Canadian or American authorities. They did so because they were violating the law by ferrying contraband, including marijuana, people, firearms, and currency across the international boarder. The main goal was to smuggle marijuana for distribution in the United States; people, firearms and currency were moved as needed to facilitate the marijuana smuggling activities. The defendant, Henry Rosenau, was one of the pilots.

In the summer of 2004, Rosenau personally delivered marijuana loads to Kip Whelpley, a cooperating government witness, in the United States. Defendant Rosenau also visited the United States with Whelpley to identify landing zones. Defendant Rosenau even held Whelpley's earnings (in cash) during the 2004 summer. Additionally, Defendant Rosenau flew another Canadian helicopter pilot into the U.S. to facilitate more helicopter smuggling. In the summer of 2005, Kip Whelpley continued to work with Rosenau off-loading marijuana shipments in the U.S. On June 9, however, Whelpley was stopped by surveilling ICE agents; his load of 485 pounds of marijuana was seized. Whelpley was released from custody because ICE did not want to reveal an ongoing investigation against Canadian smugglers. Whelpley returned to Canada but continued to participate in smuggling drugs into the United States from the Canadian side of the border. Both Whelpley and Rosenau participated in an August 4, 2005, smuggle of 500 pounds of marijuana, which was also seized. Whelpley's involvement in the conspiracy ended after the second seizure. Eventually, Whelpley was convicted and sentenced for his involvement in importing

1 marijuana into the United States. He agreed to cooperate with the government, and the
2 government intends to call Whelpley as a witness at trial.

3 On September 21, 2005, Rosenau flew a 1,100 pound load of marijuana into the
4 United States. Defendant Rosenau delivered this load to the Miraback brothers; however, it
5 too was intercepted and seized by ICE agents. Unbeknownst to Rosenau, RCMP members
6 had observed him before and during his flight into the United States. Additionally, other
7 helicopters -- identified via tail designations, brand, and color -- which had been seen
8 smuggling contraband were co-located with Rosenau's helicopter or stationary at his home.
9 A few of the helicopters, including the one that Rosenau had been flying on that day, had
10 tape over the tail identifiers in an effort to disguise the letters. On September 21, 2005,
11 RCMP contacted Rosenau immediately after he landed helicopter C-FRKM (with a piece of
12 tape on the tail so that the R appeared to be a B, that is, C-RBKM). Defendant Rosenau
13 identified himself, acknowledged a loaded handgun in his helicopter, denied flying across the
14 border, but had a GPS with the coordinates of the U.S. off-load site. This encounter with
15 RCMP members occurred on land owned by Canadian civilian Glen Stewart. The
16 government intends to call Glen Stewart and the RCMP members who surveilled the
17 defendant, who observed and photographed the helicopters, and who contacted the defendant
18 after he landed his helicopter.

19 **B. Anticipated Trial Witnesses.**

20 **(1) Witness Kip Whelpley.**

21 In January 2011, the defendant filed what appears to be a vexatious civil claim,
22 *Rosenau v. Whelpley*, in Quesnal, Canada. *See* Gov't Ex. 1 (Notice of Civil Claim).
23 Defendant Rosenau signed the civil action. *Id.* Shortly before the filing of the suit, the
24 defendant's agent, Padraig Mac Roibeaird (also known as Paddy Roberts), emailed Whelpley
25 and asked for an address to serve civil papers.³ *See* Gov't Ex. 3 (Notice of Intention to Act
26

27 ³ Paddy Roberts is well known in Canada, both as an advocate for legalization of marijuana and
28 as an opponent of extradition. He also has a criminal record. He has been convicted of forgery, false
pretenses, possession of stolen property, and importing narcotics. *See* Gov't Ex. 2 (Criminal history).

1 by Agent); Ex. 4 (Emails of January 17 to February 7, 2011). The defendant's agent quickly
2 introduced a threat: "[A]s far as I can tell, no one intends to do you any harm and that is
3 more so now that I have let it be known that you have said you do not intend to return to the
4 US. I stress the words 'as far as I can tell[.]'" See Gov't Ex. 4 (Emails of January 17 to
5 February 7, 2011).

6 On February 7, 2011, Whelpley received a lengthy email in which the defendant's
7 agent acknowledged that he was assisting Rosenau in the civil matter and that he had drafted
8 the Notice of Civil Claim. *Id.* The defendant's agent explained that people use agents to
9 avoid the extraordinary expense of lawyers. He offered to hear "without prejudice"
10 Whelpley's facts regarding the marijuana loads he received from Rosenau flying helicopter
11 C-FRKM. He asked whether Whelpley was threatened or coerced by American authorities to
12 invent stories about the defendant; he then commented about cooperators and referenced a
13 phrase used by members of the Irish Republican Army.

14 When Whelpley turned to help from legal counsel in February, the tone of the next
15 email from the defendant's agent was menacing. See Gov't Ex. 5 (Letters from Robert
16 Moffat); Ex. 6 (Email from Padraig Mac Roibeaird). In an email dated March 9, 2011,
17 Padraig Mac Roibeaird (also known as Paddy Roberts) claimed that Rosenau had obtained a
18 default judgment against Whelpley, that Rosenau could apply *ex parte* for monetary damages
19 from Whelpley, and that Whelpley was prohibited from entering the United States. See
20 Gov't Ex. 5. The defendant's agent claimed that Rosenau and his attorney would delay that
21 application for damages until they were "satisfied that [Whelpley] . . . no longer will be part
22 of the false prosecution of Mr. Rosenau." *Id.* He made his intentions clear: he intended to
23 obtain a court order compelling Whelpley to answer questions as to "the degree and method
24 of coercion" used by the United States. *Id.* He further reminded Whelpley that continuing to
25 stand by his testimony could cause Whelpley "unfortunate financial hardship," that
26 Rosenau's extradition was of great political importance, and that he viewed Whelpley's use
27 of legal counsel as a "demonstration of a lack of remorse." *Id.* He concluded with personal
28 statements about Whelpley, Whelpley's family and that he hoped the "terrible picture" will

1 soon be gone. *Id.* He attached a copy of the default judgment. *Id.* The defendant's agent
2 had no further communication with Whelpley until he sent Whelpley another email on
3 October 20, 2011.

4 Shortly thereafter, on March 31, 2011, Rosenau signed and filed with the Supreme
5 Court of British Columbia a "Notice of Intent to Act by Agent." *See* Gov't Ex. 3 (Notice of
6 Intent to Act by Agent). In the court filing, Rosenau announced that he intended to act by
7 "Agent in all further matters before the Court . . . and appoints Padraig Mac Roibeaird as his
8 Agent." *Id.* Defendant Rosenau further stated that he "grants to Padraig Mac Roibeaird the
9 right to do all those things [he] could himself do in person or by counsel in respect of this
10 matter [the civil suit against Whelpley], and by leave of the Court, where such leave is
11 required." *Id.*

12 On October 12, 2011, Rosenau and his counsel met with the Assistant United States
13 Attorneys assigned to the instant case. The purpose of the meeting, encouraged by the
14 defense counsel, was an informal "show and tell" of the government's case in an effort to
15 resolve it short of trial. During the meeting, the defense specifically inquired whether the
16 government expected Canadian civilian witnesses Whelpley and Glen Stewart to appear for
17 trial. The government responded in the affirmative. A week later, on October 18, 2011, this
18 Court ruled on several pending pretrial motions, generally denying the defense motions.

19 Two days later, on October 20, 2011, Whelpley received an email from the
20 defendant's agent asking to confirm his home address "for service for documents in the civil
21 matter between yourself and Mr. Henry Rosenau in the Supreme Court of British Columbia."
22 *See* Gov't Ex. 7 (Email from Padraig Mac Roibeaird; October 20, 2011). The defendant's
23 agent admitted that he had information "originating in the United States to that effect that
24 [Whelpley] may be considering defying [a court order] . . . and traveling to the United States
25 in contravention of the . . . [court order]." *Id.* The defendant's agent claimed that he
26 understood the information may have been "provided falsely and maliciously by the US
27 government," and therefore, "as Mr. Rosenau's agent in this matter," he needed to confirm
28 receipt of the default judgment and court orders so that ""Mr. Rosenau may have legal

1 recourse in the event you violate the terms of the Order.” *Id.* He attached another copy of
 2 the court order prohibiting Whelpley from leaving Canada and stated that Whelpley would be
 3 personally serviced unless the email was acknowledged. *Id.*

4 **(2) Witness Glen Stewart.**

5 Glen Stewart was the owner of the land where, on September 21, 2005, Rosenau
 6 landed his helicopter with a disguised tail identifier. After landing and walking away from
 7 his helicopter, with the blades still rotating, Rosenau was approached by RCMP members.
 8 The RCMP members spoke with Rosenau and Glen Stewart, who identified himself as the
 9 property owner. Glen Stewart gave RCMP permission to look in a shed/shop on the
 10 property. In the shop, RCMP found another helicopter belonging to the defendant, a trailer,
 11 aviation fuel, and the defendant’s car.

12 Between Defendant Rosenau’s initial appearance in this District and the week of
 13 October 20, 2011, law enforcement had been in contact with Glen Stewart about testifying at
 14 trial. He indicated his willingness to travel to the United States and testify. Through the
 15 RCMP, Glen Stewart was scheduled to meet with the federal prosecutors on October 26,
 16 2011. On the day prior to the scheduled meeting, however, Glen Stewart called the RCMP
 17 and said that his lawyer had advised him not to meet with the prosecutors. When asked, he
 18 said he could not remember the name of his lawyer; he said he would not testify at Rosenau’s
 19 trial. A copy of a report from an RCMP member who had been dealing with Glen Stewart is
 20 attached. *See Gov’t Ex. 8 (Report from RCMP Corporal Therese Cochlin).*

21 **(3) RCMP Witnesses and Evidence.**

22 Several RCMP members are critical trial witnesses and the evidence they obtained and
 23 seized from Rosenau are both highly probative and necessary in the instant criminal
 24 prosecution. On October 25, 2011, a Notice of Application entitled *Henry Carl Rosenau v.*
 25 *Regina*, was filed in Vancouver, B.C. *See Gov’t Ex. 9 (Notice of Application).* The two
 26 page Notice of Application, filed six years after the event, claims that Rosenau will apply for
 27 a return of the seized evidence, a prohibition on RCMP disclosing Rosenau’s statements
 28 made to them, a prohibition on the RCMP members leaving Canada for the purpose of

1 | testifying in the United States, and a prohibition on sending the physical evidence out of
 2 | Canada. The Notice of Application says it will be supported by affidavits from Rosenau and
 3 | Glen Stewart. The government has sought but not received copies of the affidavits from
 4 | Canada. On November 2, 2011, the Notice of Application was heard and dismissed. Last
 5 | Friday, on November 4, 2011, Defendant Rosenau appealed. *See* Gov't Ex. 10 (Notice of
 6 | Appeal).

7 | Les Rose, Legal Counsel for the RCMP, has been consulted regarding the effect of the
 8 | dismissed Notice of Application and pending Notice of Appeal on the evidence and
 9 | testimony expected at trial. Without opining on the likelihood of success of the Notice of
 10 | Appeal, Mr. Rose wrote that he is advising the RCMP not to testify in the United States or to
 11 | produce the evidence until the Notice of Application is resolved. Initially, he believed the
 12 | Notice of Application would not be resolved by the trial date of November 7, 2011. Now
 13 | that the defendant has appealed the dismissal of the Notice of Application, it is unclear when
 14 | the Canadian witnesses and evidence will be available for the trial.

15 | **C. Statement of Relevant Proceedings.**

16 | On April 28, 2011, the defendant appeared for his arraignment and initial appearance
 17 | on one count of conspiracy to import marijuana, one count of conspiracy to distribute
 18 | marijuana, and one count of possession of marijuana with intent to distribute as charged in
 19 | the superseding indictment. At this hearing, the government moved to detain Rosenau, citing
 20 | the rebuttable presumption that no conditions could reasonably assure his appearance at trial
 21 | and the safety of the community.

22 | **1. Detention Hearing.**

23 | The detention hearing took place on May 4, 2011. Prior to this hearing, Pretrial
 24 | Services interviewed Rosenau and prepared a report recommending that the defendant be
 25 | released pending trial. Despite the presumption of detention, the defendant was released to
 26 | his home in Quesnel, Canada, subject to certain conditions. *See* Gov't Ex. 11 (Appearance
 27 | Bond); Ex. 12 (Conditions of Supervision).
 28 |

1 **2. First Revocation Hearing.**

2 On July 21, 2011, Rosenau violated his conditions of release by possessing marijuana.
3 At his bond revocation hearing, he admitted the violations. He was once again released on an
4 appearance bond but his conditions of release were modified to include drug and alcohol
5 testing. In addition, he was ordered to live in a home free of any controlled substances,
6 which meant that he could no longer live at his residence with a marijuana grow. To date, he
7 has not moved to a new residence. *See* Gov't Ex. 13 (Bond Revocation Hearing Transcript at
8 10).

9 **3. Second Revocation Hearing.**

10 On October 28, 2011, Rosenau appeared for another revocation hearing. Prior to this
11 hearing, Pretrial Services prepared a report recommending that the defendant be detained
12 pending trial.

13 **a. Government's arguments for detention**

14 At the revocation hearing, the government renewed its argument for detention based
15 on the presumption against release and argued that Rosenau had indirect contact with a
16 critical government witness. As a result of that improper contact, the government contended
17 that Rosenau should be detained pending trial.

18 In support of its argument, the government elicited testimony from Pretrial Services
19 Officer Julie Busic. Officer Busic testified that she explained the conditions of release to the
20 defendant, including the special condition that he not have direct or indirect contact with any
21 potential witnesses in the underlying criminal matter. *Id.* According to Officer Busic, on
22 May 25, 2011, she was contacted by defense counsel about "third parties" who "may need to
23 be served regarding *extradition*." *Id.*, at 11 (emphasis added). At the time of defense
24 counsel's inquiry, Officer Busic had not received a list of possible witnesses; she therefore
25 responded to defense counsel that "as long as it was a legal matter served by legal counsel,"
26 she would not object to the contact. *Id.* Officer Busic understood that defense counsel's
27 question related to extradition matters only. *Id.*
28

1 A few weeks later, on June 14, 2011, Officer Busic sent the defendant and defense
 2 counsel a list of possible government witnesses, including Kip Whelpley. *Id.*, at 12; *see also*
 3 Gov't Ex. 14 (Gov't witness list). Two days later, Officer Busic spoke with the defendant
 4 about the witness list. *Id.*, at 12. Officer Busic recalled that Defendant Rosenau disavowed
 5 any knowledge of the people identified on the witness list. *Id.*, at 12-13 ("He's worried
 6 because he didn't know any of the names of the list of prohibited parties.").

7 At the revocation hearing, the government established that, through his agent Padraig
 8 Mac Roibeaird (aka Paddy Roberts), the defendant had indirect contact with Kip Whelpley, a
 9 cooperating government witness, and therefore violated his conditions of release. The
 10 government made clear that Defendant Rosenau was advised by Pretrial Services not to have
 11 direct or indirect contact with any witnesses, including Whelpley. The government also
 12 showed that Rosenau lied to Pretrial Services when he claimed he did not recognize any of
 13 the names on the witness list and that he violated his conditions of release when he allowed
 14 his agent to directly contact a witness and "remind" Whelpley of the default judgment and
 15 court order, both of which Rosenau had vigorously pursued as part of his civil claim against
 16 Whelpley. The government made clear that Rosenau's indirect contact with a witness had
 17 nothing to do with extradition proceedings. Rather, the indirect contact was designed to do
 18 one thing: prevent a critical witness from testifying at trial.

19 Finally, the government reiterated that, given the remoteness of the defendant's
 20 location and his blatant disregard for the court's conditions of release, no condition or
 21 combination of conditions existed which would reasonably assure the safety of the
 22 community.

23 **b. Magistrate Judge Tsuchida's decision.**

24 After listening to the arguments of counsel, Magistrate Judge Tsuchida ordered
 25 Defendant Rosenau detained pending trial. Following the hearing, Judge Tsuchida issued a
 26 written Detention Order finding that there were no conditions or combination of conditions
 27 that would reasonably assure the appearance of the defendant as required and the safety of
 28 the community. *See* Gov't Ex. 15 (Detention Order).

1 In support of findings, Judge Tsuchida first acknowledged that neither the defendant's
 2 American or Canadian counsel were involved in the civil suit against Kip Whelpley. Rather,
 3 the civil lawsuit was initiated by the defendant, who, as the plaintiff, is the sole beneficiary of
 4 the suit. Judge Tsuchida was unpersuaded by defendant's argument that the civil suit was the
 5 product of an out-of-control paralegal employed by the defendant's extradition attorney.
 6 Judge Tsuchida found that the defendant had done nothing to distance himself from the civil
 7 suit. To the contrary, the court concluded that Rosenau had succeeded in obtaining a court
 8 order which directed Whelpley to pay money damages and prohibited Whelpley from
 9 traveling outside of Canada.

10 Judge Tsuchida also determined that the defendant had been untruthful when asked by
 11 Pretrial Services Officer Julie Busic whether he knew any of the people on the trial witness
 12 list. Judge Tsuchida found that the defendant knew Whelpley because, six months earlier, he
 13 had filed a civil lawsuit against Whelpley and, in March 2011, he had obtained a default
 14 judgment and court order against Whelpley.

15 III. LAW AND ARGUMENT

16 A. Applicable Law.

17 The Bail Reform Act provides a defendant should be detained pending trial if "no
 18 condition or combination of conditions . . . will reasonably assure the appearance of the
 19 person as required and the safety of any other person and the community." 18 U.S.C. §
 20 3142(f). The government bears the burden of showing both that a defendant poses a danger
 21 to the community by clear and convincing evidence, and that a defendant poses a flight risk
 22 by a preponderance of the evidence. *United States v. Gebro*, 948 F.2d 1118, 1120 (9th Cir.
 23 1991). The Act identifies four factors a court should consider in analyzing detention issues:
 24 "(1) The nature and circumstances of the offense charged, including whether the offense . . .
 25 involves a narcotic drug; (2) the weight of the evidence . . . ; (3) the history and
 26 characteristics of the person, including . . . family ties, employment, financial resources,
 27 length of residence in the community, community ties, past conduct, history relating to drug
 28 or alcohol abuse, criminal history, . . . ; and (4) the nature and seriousness of the danger to

any person or the community that would be posed by the person's release" 18 U.S.C. § 3142(g). Of these factors, weight of evidence is least important and the statute neither requires nor permits pretrial determination of guilt. 18 U.S.C. §3142(g).

Nonetheless, the Bail Reform Act expressly provides that:

[s]ubject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.) . . . or an offense under section 924(c) . . . of title 18 of the United States Code. . . .

18 U.S.C. § 3142(e). The return of an indictment is sufficient to support a finding of probable cause triggering this rebuttable presumption. *See, e.g., United States v. Hazime*, 762 F.2d 34, 37 (6th Cir.1985); *United States v. Stricklin*, 932 F.2d 1353, 1354 (10th Cir. 1991). Here, the superseding indictment charging Rosenau was returned prior to the detention hearing. Thus, the presumption in 18 U.S.C. 3142(e) applies.

While this Court has not addressed the burdens associated in its application, other Courts have found that where a § 3142(e) presumption applies, the defendant bears the burden of producing evidence that he does not pose a danger to the community or risk of flight in order to rebut the presumption. *See, e.g., United States v. Abad*, 350 F.3d 793, 797 (8th Cir. 2003) and *United States v. Mercedes*, 254 F.3d 433, 436 (2d Cir.2001). The government retains the burden of persuasion. *Mercedes*, 254 F.3d at 436.

Even if a defendant meets his burden of production, the presumption favoring detention does not disappear. Rather, it remains a factor to be considered among those weighed by the court. *See Mercedes*, 254 F.3d at 436. If the presumption vanished once a defendant produced some evidence, courts would not be giving adequate deference to the fact that Congress has determined "that drug offenders pose a special risk of flight and dangerousness to society." *United States v. Hare*, 873 F.2d 796, 798-99 (5th Cir.1989). *See also United States v. Martir*, 782 F.2d 1141, 1144 (2d Cir.1986).

Applying these principles here, this Court should detain Rosenau pending trial.

1 Even if the Court assumes that Rosenau has overcome the presumption of detention,
 2 he should be detained because he clearly violated a term of his release, he poses a danger to
 3 another person and the community, and he is unlikely to abide by any condition or
 4 combination of conditions of release. 18 U.S.C. § 3148(b)(1). Threats to witnesses justifies
 5 revocation of release. *See U.S. v. Ruggerio*, 796 F.2d 35 (2d Cir. 1986).

6 **B. Rosenau failed to rebut the presumption for detention.**

7 Defendant Rosenau has failed to present facts sufficient to rebut the presumption for
 8 detention. Rosenau faces a mandatory minimum term of 10 years imprisonment and
 9 maximum term of life imprisonment for importing thousands of pounds of marijuana into the
 10 United States. This exposure gives Rosenau ample incentive to flee rather than face the
 11 charges. Because of his ties to drug dealers and gang members in Canada, he has a place to
 12 flee and hide. Moreover, Rosenau had (and may still have) access to substantial amount of
 13 money, which could help him flee this District and stay hidden for a protracted period. In
 14 fact, Rosenau has spent years fighting the extradition process and he continues his timely and
 15 costly legal wrangling in Canada.

16 **C. The government has met its burden of persuasion.**

17 The treatment of drug offenses in the Bail Reform Act establishes that Congress
 18 considered these offenses to present specific risks of nonappearance and danger to the
 19 community. Thus, the nature of the charges weighs heavily in favor of detention irrespective
 20 of the presumption.

21 While the weight of the evidence is the least persuasive factor, nonetheless it is to be
 22 considered. Rosenau, a helicopter pilot, smuggled thousands of pounds of marijuana into the
 23 United States between 2004 and 2005. He also smuggled people and money into the United
 24 States. By any measure, this is substantial evidence of the defendant's drug trafficking
 25 activity. This factor weighs in favor of detention particularly where the imprisonment
 26 consequences of a conviction include a mandatory minimum term of 10 years in prison.

27 While Rosenau has no criminal history, he is associated with the UN Gang in British
 28 Columbia. He has ties to enforcers in Canada, some of whom threatened participants in the

1 instant drug smuggling conspiracy after two large loads of marijuana were seized. Rosenau
2 was also armed with a firearm when he smuggled drugs into the United States. For example,
3 when he was approached by RCMP members on September 21, 2005, he possessed a firearm
4 and extra ammunition.

5 Clearly, Rosenau has demonstrated that he has no regard for the rule of law and
6 cannot be trusted to abide by any pre-trial release conditions imposed by the court. To date,
7 he has had indirect contact with at least one important government witness. To distance
8 himself from the civil claim against Whelpley is disingenuous. In January 2011, Rosenau
9 signed and filed the civil lawsuit naming Whelpley as a defendant. He's the named plaintiff
10 and sole beneficiary of the suit. He obtained a default judgment against Whelpley, a key
11 witness, and a court order directing Whelpley to pay money damages and prohibiting
12 Whelpley from traveling to the United States.

13 To distance himself from Padraig Mac Roibeaird (aka Paddy Roberts) is also spurious.
14 In March 2011, Rosenau made Paddy Roberts his agent for "all further matters before" the
15 Supreme Court of British Columbia. *See* Gov't 2 (Notice of Intent to Act by Agent). In a
16 court filing, which he signed, Rosenau granted "Padraig Mac Roibeaird the right to do all
17 those things [he] could himself do in person or by counsel in respect of this matter [the civil
18 suit against Whelpley], and by leave of the Court, where such leave is required." *Id.*

19 Rosenau's recent claim that he had nothing to do with contacting a witness is not
20 believable. First, Rosenau's own credibility is suspect after he lied to Pretrial Services about
21 not knowing any of the people on the prospective witness list, including Whelpley. At the
22 time he reviewed the witness list with Officer Busic, Rosenau had been pursuing his civil
23 claim against Whelpley for more than six months. Second, despite an insinuation to the
24 contrary by defense counsel, it is clear that Rosenau has had frequent contact with his agent,
25 Padraig Mac Roibeaird (aka Paddy Roberts). In fact, within a week of learning that the
26 government intended to call Whelpley as a trial witness, the defendant's agent had contacted
27 Whelpley. Third, Rosenau has a habit of using a someone else to contact or influence
28 potential witnesses. Obviously, someone advised Glen Stewart not to meet with the federal

1 prosecutors or testify at the defendant's trial, all of which suggests that the defendant or, or
2 someone acting on the defendant's behalf, had direct or indirect contact with yet another trial
3 witness. Fourth, Rosenau's indirect contact with Whelpley is similar to the obstructionist
4 tactics he has employed against the RCMP.

5 Finally, Rosenau has abused the unique privilege afforded certain foreign defendants
6 in this District. In this District, defendants who are Canadian citizens may be released to
7 their homeland while being supervised from afar by Pretrial Services. The unusual program
8 cannot function properly unless the defendant is honest and cooperative with Pretrial
9 Services. In turn, the Pretrial Services Officer must be assured that the defendant is abiding
10 by the terms of his conditions of release because enforcement is limited. Therefore, trust
11 between the defendant and the Pretrial Services Officer is imperative. Here, Rosenau has
12 violated that trust and thereby forfeited his right to participate in this District's unique
13 program.

14 All of these facts combine to establish that there simply is no combination of
15 conditions that will assure that Rosenau will not flee or otherwise present a danger to another
16 person or the community.

17 //

18 //

19 //

IV. CONCLUSION

Defendant Rosenau faces serious drug trafficking charges, which raise the presumption of detention. Even if the Court concludes that Rosenau has overcome the presumption of detention, he should be detained pending trial because he violated his pretrial release conditions by having indirect contact with trial witnesses. Laundering inappropriate contact through counsel or through an “agent” does not absolve the defendant or vitiate the violation of the court’s conditions of release. Moreover, the conduct borders on obstruction of justice as well as embraces threats and intimidation toward possible trial witnesses. The defendant has shown that he does not abide by the terms of the court’s ruling and that there is no set of conditions that this Court can impose upon Rosenau, living in Quesnal, British Columbia, which can be enforced or adequately monitored.

The defendant should be detained.

DATED this 8th day of November, 2011.

Respectfully submitted,

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s/Susan M. Roe
SUSAN M. ROE
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CERTIFICATE OF SERVICE

I hereby certify that on 11/8/11 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the attorney(s) of record for the defendant(s).

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